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No. 622.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The purpose of this brief is to comment on the Government's Brief in Opposition, and to supply additional authorities.

The opposition presents four points (B. Opp. 11, 15, 17, 18) which correspond with petitioner's first, second, third, and sixth Reasons for Granting the Writ (Pet. 11, 16, 19, 27); and this reply is limited to such points.

ARGUMENT.

(1) Respecting the burden of producing evidence in Net Worth prosecutions, with particular reference to the Government's failure to make proof of petitioner's gifts, inheritances and loans during the indictment period (Pet. 11-16; B. Opp. 11-15), petitioner notes that the conflict between the Courts of Appeal has been pointed up by the latest decision, *Ford* v. *U. S.*, (C. A. 5) 210 F. 2d 313, wherein it is stated that, in Net Worth prosecutions, "The Government * * * has the further burden * * * of proving that there were no gifts, devices (*sic*), or other nontaxable income * * *," l. c. 315. Contrast this with the following from Government's Brief: "In this case, it is true, the Government did not exclude the possibility that the increases had come from gifts, devises or loans. But it was not incumbent on the Government to exclude all speculative possibilities of innocence" (B. Opp. 12). Conceding again that the Government's position is supported by the controlling rule in the Eighth Circuit as announced in *Schuermann* v. *U. S.*, 174 F. 2d 397, the *Ford* decision, *supra*, supplements petitioner's demonstration in cases cited (Pet. 12-13) that there is a continuing and recurring conflict which should be settled by this Court. See *Remmer* v. *U. S.*, No. 304, 346 U. S. 884, decided March 8, 1954, on other grounds.

Numerous cases cited by the Government (B. Opp. 12-13) are not in point since they relate to *degrees* of proof rather than the *burden* of proof, the latter being the issue raised by petitioner. The Government's Net Worth proof in the cause at bar contains no scintilla of evidence relating to petitioner's gifts and inheritances, so decisions

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as to what constitutes "substantial" evidence can have no application. The inescapable question is which party has the burden of producing evidence of non-taxable receipts. The Government's citation of cases, in seeking to avoid the burden of proof (B. Opp. 14), reveals the thin analogies upon which it relies. See *U. S.* v. *Fleischman*, 339 U. S. 349, including dissenting opinions; compare Pet. 13-15. It is apparent that a serious issue has been raised for this Court's consideration.

In arguing that the Court should let the failure of proof in this case slip by, because not objected to at trial, the Government omits to consider petitioner's arguments on this issue (Pet. 15-16). The Government implies that petitioner admitted at trial that the Government's Net Worth Statement correctly presented petitioner's income during 1945 through 1948, and states that he is now maintaining that there was "no failure at all" in reporting income (B. Opp. 12), neither of which suggestions can find support in the Record or Petition. Petitioner has always conceded certain items negligently omitted from his returns (R. 44). His position here, as below, is that the failure of proof as to gifts, inheritances, and loans is a matter of law rather than an issue for the jury.

The Government further seeks to defer this Court's resolution of the conflict between the Circuits by stating, without Record citation, that there was in this case "an intensive investigation which had revealed no gifts or other non-taxable receipts to account for the increases in petitioner's wealth" (B. Opp. 13). In fairness to petitioner, this unwarranted comment, completely outside the Record, should bear the test of a new trial.

Again, in seeking to distinguish the leading cases favorable to petitioner, the Government states, "In each of

these cases there was an incomplete investigation * * *" (B. Opp. 15). This is no distinction; so far as appears from the present Record, there was no investigation of petitioner's gifts or inheritances. The instant case is a most appropriate one for determining whether, before obtaining an income tax conviction, the Government has the obligation to make such investigation and proof.

(2) Respecting the erroneous admission into evidence and instruction given on petitioner's financial statements containing some $150,000 of market value appreciation which should not have been treated as income (Pet. 6-8, 16-19), the Government continues to advocate the patent error that such inflated market-value statements can be used to "corroborate" a Net Worth Statement, even though, in the Government's language, a net worth computation, "in order to present a true picture of petitioner's income, must necessarily value his assets at cost" (B. Opp. 16). Unless corrected here, the Government has served notice that it will continue to misuse this type of testimony.

The Government's Brief further erroneously states that the acquittal for 1949 and 1950 shows that the financial statements were not prejudicial (B. Opp. 16), despite the obvious explanation that the acquittal was based on the testimony of petitioner's accountant (R. 52-55), unrelated to said financial statements. The Government seeks to link the instructions regarding the financial statements to its own Net Worth Statement rather than to petitioner's financial statements (B. Opp. 16), but a reading of the instructions (R. 71-2) rebuts the suggestion. Finally, the Government claims, "The calculation upon which petitioner now relies (Pet. 18) is fallacious * * *" (B. Opp. 16); but the questioned method of calculation is not petitioner's but the trial court's (R. 71-2). If alleged non-deductible expenditures are to be taken into consid-

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eration in such a calculation, as suggested by the Government, then various deductions should be considered (R. 9), as well as the admittedly unreported income which was explained at trial (R. 52-55, 44) or which the jury found to have been innocently omitted. No precise calculation of income can be made from said financial statements, because market values cannot be reduced to cost on each item and because year-end figures are not available, as required for such a calculation (R. 25); but this does not detract from petitioner's unchallenged demonstration that more than $150,000 of unrealized market value appreciation was erroneously treated as income in this prosecution, and that petitioner was held accountable for said sum as though it were income, to his grave prejudice (Pet. 6-8, 16-19).

(3) Respecting the erroneous admission into evidence of petitioner's tax payments for prior years (Pet. 19-21), the Government states, without explanation, that such payments were "obviously relevant to the establishment of (petitioner's) net worth at the starting point" (B. Opp. 17), although construction of a financial statement out of moneys expended for taxes in prior years remains a baffling procedure. This sleight-of-hand cannot be passed off as "obvious." Nor can the Government properly interpret the testimony of its witness, wherein he stated that such payments had no bearing on the Net Worth Statement (Tr. 391-3), as not including the beginning net worth (B. Opp. 17). This testimony will bear no such strained limitation.

(4) Respecting the serious errors in the prosecutor's closing argument and the trial court's charge (Pet. 9-10, 27-29), extensive additional comment is unnecessary. The Government commendably concedes doubts and probable error concerning the trial court's instruction on Mrs.

Mitchell's alleged "negative" testimony as being "weak testimony as compared with the positive testimony" that disputed payments were actually made (B. Opp. 18, 19; R. 73). The instruction was not merely an expression of opinion on the facts (B. Opp. 20), but was a statement of law. "That kind of testimony is what the courts would call negative testimony, and it is testimony that is not strong" (R. 73). This erroneous legal instruction must have been considered controlling, especially in view of the additional error in argument tending to convince the jury that the court had ruled that the disputed payments were made (R. 64-65).

It should be further noted that no substantial defense is made regarding the specific errors in argument cited by petitioner, the Government relying on a premise, which is seriously disputed, that "The prosecutor's argument * * * considered as a whole (R. 57-65), was not unfair" (B. Opp. 19). No similar attempted defense is made regarding the trial court's instructions (R. 65-77), probably because the general tenor of argument, advocacy, and unbalanced presentation cannot be readily defended. *Spalitto* v. *U. S.*, (C. A. 8) 39 F. 2d 782, 788.

CONCLUSION.

For the foregoing additional reasons, and without waiver of matters presented in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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